

Order

Michigan Supreme Court Lansing, Michigan

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99-31

Proposed Amendment of
Subchapter 9.200 of
the Michigan Court Rules

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In response to requests from numerous individuals and groups, the Court is considering a comprehensive amendment of subchapter 9.200 of the Michigan Court Rules, which applies to the judicial discipline system. It has been more than thirty years since extensive revisions were made to these rules. The proposal that the Court today is publishing for comment addresses many of the concerns that have been raised. For example, the proposed addition of subrule 9.202(G) ensures that members of the Judicial Tenure Commission staff who are involved in investigating and prosecuting a matter will have no role at the decisional stage of the matter. Other proposed amendments enhance the investigative capacity of the commission, yet at the same time strengthen the due process rights of those who are being investigated, e.g., the commission's subpoena power is clarified and there is a requirement for earlier notification of those whom the commission is asked to investigate.

Some of the recommendations that the Court has received envision changes that this proposal does not incorporate. For instance, there have been requests to "bifurcate" the multiple roles of the commission by making more drastic structural changes, and to limit the number of terms that commission members may serve. The fact that the published proposal does not contain such provisions, some of which arguably would require constitutional amendment, should not be viewed as foreclosing debate on those issues. To the contrary, the Court welcomes the views of all who wish to address any aspect of the proposal or to suggest alternatives. All comments will be carefully considered before the Court takes final action, and the matter will be placed on the agenda of a public hearing. Notice of future public hearings will be provided by the Court and posted at its website, www.supremecourt.state.mi.us. Of course, publication of the proposal and consideration at a public hearing does not imply probable adoption of the proposal in its present form or, indeed, that the Court will adopt any version of the proposal.

[The present language would be amended as indicated below.]

Subchapter 9.200 Judicial Tenure Commission

Rule 9.200 Construction

An independent and honorable judiciary being indispensable to justice in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system, to enhance public confidence, and to protect the public, the courts, and the rights of the judges who are governed by these rules.

Rule 9.201 Definitions

As used in this chapter, unless the context or subject matter otherwise requires

- (1) "commission" means the Judicial Tenure Commission;
- (2) "judge" means a person who is serving as a judge of an appellate or trial court by virtue of election, appointment, or assignment, or a person who formerly held such office and is named in a request for investigation with respect to conduct that occurred during the person's tenure and is related to the office, or a magistrate or referee ~~of a court~~ appointed or elected under the laws of this state;
- (3) "respondent" is a judge against whom a complaint has been filed;
- (4) "chairperson" is the commission chairperson and includes the acting chairperson;
- (5) "master" means one or more judges or former judges, ~~active or retired,~~ appointed by the Supreme Court ~~on~~ at the commission's request to hold hearings on a complaint against a judge filed by the commission;
- (6) "examiner" means the executive director or equivalent staff member or other attorney ~~one or more attorneys~~ appointed by the commission to ~~gather and present evidence and to act as counsel for the commission at a hearing before a master, the commission, or in proceedings in the Supreme Court, before a master, or before the commission;~~
- (7) "complaint" is a written document filed ~~by~~ at the ~~direction of the commission, in its order for recommending disciplinary action under this chapter~~ against a judge, ~~and which alleges~~ specific charges of misconduct in office, or mental or physical disability, or some other ground that ~~which~~ warrants commission action under Const 1963, art 6, § 30;

- (8) "request for investigation grievance" is an allegation of judicial misconduct, ~~or physical or mental disability, or other circumstance within the commission's jurisdiction which that~~ the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.207.

Rule 9.202 Judicial Tenure Commission; Organization

- (A) Appointment of Commissioners. As provided by Const 1963, art 6, § 30, the Judicial Tenure Commission consists of 9 persons. The commissioners selected by the judges ~~are to~~ shall be chosen by mail vote conducted by the state court administrator. The commissioners selected by the state bar members ~~must~~ shall be chosen by mail vote conducted by the State Bar of Michigan. Both mail elections must be conducted in accordance with nomination and election procedures approved by the Supreme Court. Immediately after a commissioner's ~~election or appointment, the Governor, the state court administrator, and the State Bar of Michigan~~ selection, the selecting authority shall ~~notify~~ give notice of the election or appointment to the Chief Justice.
- (B) Term of Office. A commissioner's ~~holds office for a term of office shall be~~ shall be 3 years. To achieve staggered terms, ~~three terms expire annually. In consecutive years,~~ the following terms shall expire in consecutive years:
- (1) one of the ~~an~~ appointments of the Governor, the judge of a court of limited jurisdiction, and one of the ~~an~~ attorneys elected by the state bar;
 - (2) the other ~~an~~ appointment of the Governor, the probate judge, and the other ~~an~~ attorney elected by the state bar;
 - (3) the Court of Appeals judge, the circuit judge, and the judge elected by the state bar.
- (C) Vacancy.
- (1) A vacancy in the office of a commissioner occurs:
 - (a) when a commissioner resigns or is incapable of serving as a member of the commission;
 - (b) when a judge who is a member of the commission no longer holds the office ~~which he or she held~~ when selected;
 - (c) when an attorney selected by state bar members is no longer ~~admitted~~ entitled to practice in the courts of this state; and

- (d) when an appointee of the Governor becomes an attorney ~~or accepts a judicial position.~~
- (2) Vacancies must be filled by selection of a successor in the same manner required for the selection of ~~his or her~~ the predecessor. The commissioner selected shall holds office for the unexpired term of ~~the his or her~~ predecessor. If a commissioner is elected or appointed to a succeeding term, and a vacancy occurs during the unexpired term of the commissioner being replaced, the replacement commissioner shall fill the vacancy and serve the unexpired term. Vacancies must be filled within 3 months after the vacancy occurs.
- (3) A member may retire by submitting a ~~his or her~~ resignation in writing to the commission, which must certify the vacancy to the selecting authority.
- (D) Commission Expenses ~~of Commission and Staff.~~
- (1) The commission's budget must be submitted to the Supreme Court for approval.
- (2) The commission's expenses must be included in and paid from the appropriation for the Supreme Court.
- (3) A commissioner may not receive compensation for ~~his or her~~ services but must be paid ~~his or her~~ reasonable and necessary expenses.
- ~~(4) The commission may employ an executive director and other employees to perform the duties it directs, subject to the availability of funds under its budget. Commission employees are exempt from the operation of Const 1963, art 11, § 5, as are employees of courts of record.~~
- (E) Quorum and Chairperson.
- (1) The commission ~~elects~~ shall elect from its members a chairperson and a vice-chairperson, each to serve 2 years. The vice-chairperson shall ~~acts~~ as chairperson when the chairperson is absent. If both are absent, the members present may select one among them to act as temporary chairperson.
- (2) A quorum for the transaction of business by the commission is 5.
- (3) The vote of a majority of the members constitutes the adoption or rejection of a motion or resolution before the commission. The chairperson is entitled to cast a vote as a commissioner.

(F) Meetings of Commission. Meetings must be held at the call of the chairperson, or the executive director, or upon the written request of 3 commission members.

(G) Commission Staff.

(1) The commission shall employ an executive director or equivalent person or persons, and such other staff members as the commission concludes are warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget.

(2) The executive director or any other staff person who is involved in the investigation or prosecution of a judge

(a) shall not be present during the deliberations of the commission or participate in any other manner in the decision to file formal charges or to recommend action by the Supreme Court with regard to that judge, and

(b) shall have no ex parte communication with the commission regarding a formal complaint that the commission has authorized.

(3) Commission employees are exempt from the operation of Const 1963, art 11, § 5, as are employees of courts of record.

Rule 9.203 Judicial Tenure Commission; Powers; Review

(A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a master are governed by these rules. The commission may adopt and publish administrative rules for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court for approval.

(B) Review as an Appellate Court. The commission may not function as an appellate court to review the decisions of ~~the a court~~ or to exercise superintending or administrative control of ~~the a courts~~, except as that review but may examine decisions is incident to a complaint of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.207. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct.

(C) Control of Commission Action. Proceedings under these rules are subject to the direct and exclusive superintending control of the Supreme Court. No other court has jurisdiction to

restrict, control, or review the orders of the master or the ~~tenure~~ commission.

- (D) Errors and Irregularities. An investigation or proceedings under this chapter may not be held invalid by reason of a nonprejudicial irregularity or for an error not resulting in a miscarriage of justice.
- (E) Jurisdiction Over Visiting Judges. Notwithstanding MCR 9.116(B), the Attorney Grievance Commission may take action immediately ~~against~~ with regard to a visiting judge who currently holds no other judicial office if the allegations ~~of misconduct~~ pertain to professional or personal activities unrelated to the ~~respondent's~~ judge's activities as a judge.

Rule 9.204 Disqualification of Commission Member or Employee

- (A) Disqualification ~~F~~from Participation. A judge who is a member of the commission or of the Supreme Court is disqualified from participating in that capacity in proceedings involving the judge's ~~his or her own actions~~ discipline, suspension, retirement, or removal.
- (B) Disqualification from Representation. A member or employee of the ~~Judicial Tenure~~ Commission may not represent
 - (1) a respondent in proceedings before the commission, including preliminary discussions with employees of the commission prior to the filing of a request for investigation; or
 - (2) a judge ~~or former judge~~ in proceedings before the Attorney Grievance Commission, or the Attorney Discipline Board and its hearing panels, as to any matter that was pending before the Judicial Tenure Commission during the member's or employee's tenure with the ~~Judicial Tenure~~ Commission.

Rule 9.205 Standards of Judicial Conduct

- (A) Responsibility of Judge. A judge is personally responsible for the judge's ~~his or her own~~ behavior and for the proper conduct and administration of the court in which the judge ~~he or she~~ presides.
- (B) Grounds for Action Discipline. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice as defined by subrule (C) or because of disability as defined in subrule (D).

- (1E) Misconduct in office includes, but is not limited to A judge is guilty of misconduct in office if:
- (1) ~~the judge is convicted in the United States of conduct which is punishable as a felony under the laws of Michigan or federal law;~~
 - (2) ~~the judge persistently fails to perform judicial duties;~~
 - (3) ~~the judge is habitually intemperate within the meaning of Const 1963, art 6, § 30;~~
 - (4) ~~the judge's conduct is clearly prejudicial to the administration of justice;~~
 - (5) (a) ~~the judge is~~ persistently incompetent~~ce~~ or neglectful in the timely performance of judicial duties;
 - (6) (b) ~~the judge persistently fails~~ failure to treat persons fairly, with and courteously and respect; ~~or~~
 - (7) (c) ~~the judge treatment of~~ a person unfairly, or discourteously, or disrespectfully because of the person's race, gender, or other protected personal characteristic;
 - (d) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and
 - (e) failure to cooperate with a reasonable request made by the commission in its investigation of a judge.
- (2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge.
- (D) ~~Disability. A judge is subject to suspension, retirement, or removal from office for physical or mental disability which significantly interferes with the capacity to perform his or her judicial duties.~~
- (E) ~~Code of Judicial Conduct; Rules of Professional Responsibility. Conduct in violation of the Code of Judicial Conduct or rules of professional responsibility, whether the conduct complained of occurred before or after the respondent became a judge or was or was not connected with his or her judicial office, may constitute misconduct in office, conduct that is clearly prejudicial to the administration of justice, or another ground for discipline listed in Const 1963, art 6, § 30. The question in every case is whether the conduct complained of constitutes misconduct in office, conduct that is clearly prejudicial to the administration of justice, or another ground of discipline listed in Const 1963, art 6, §~~

~~30, not whether a particular canon or disciplinary rule has been violated. All the circumstances are to be considered in deciding whether action by the commission is warranted.~~

(3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.

Rule 9.206 Service and Notice

- (A) ~~Service Judge.~~ When provision is made under these rules for serving notice of a complaint or other document on a judge ~~or respondent~~, the notice must be made by service in person or by registered or certified mail to the judge's his or her judicial business office or last known residence. If an attorney has appeared for a ~~judge respondent~~, notice may be served on the attorney in lieu of service on the ~~judge respondent~~.
- (B) ~~Notice Commission.~~ Service of notice on the commission must be made by personal delivery delivering or mailing by registered or certified mail to the ~~commission's~~ executive director at the commission's office.

Rule 9.207 Preliminary Investigation; Notice

- (A) ~~Requests for Investigation. Unless the commission chooses to act on its own initiative or at the request of the Chief Justice or the state court administrator, a~~ A request for action investigation by the commission of a judge must be made in writing and verified on oath of the complainant. The commission may also act on its own initiative or at the request of the Supreme Court, the state court administrator, or the Attorney Grievance Commission.
- (B) ~~Preliminary Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held. If there is insufficient cause to warrant filing a complaint, the commission may:~~
- (1) dismiss the matter,
 - (2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct,
 - (3) dismiss the matter contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring,

- (4) admonish the respondent, or
- (5) recommend to the Supreme Court private censure, with a statement of reasons.

If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members determine that the public interest and the interests of justice require otherwise.

- ~~(1) On receiving a verified statement, found on examination and inquiry to be neither unfounded nor frivolous, alleging facts indicating that a judge is guilty of misconduct in office or suffers from physical or mental disability;~~
- ~~(2) on receiving a request for investigation from the Attorney Grievance Commission; or~~
- ~~(3) on request of the Chief Justice or the state court administrator, the commission must conduct a preliminary investigation to determine whether a complaint is to be filed and a hearing held. The commission may, on its own initiative and without receiving a statement, make inquiry and a preliminary investigation with respect to whether a judge is guilty of misconduct in office or is physically or mentally disabled~~

(C) Notice to Judge.

- (1) Request for investigation. The commission must promptly give written notice to the judge who is the subject of a request for investigation unless the commission determines that the request is clearly unfounded or frivolous, or that the interests of justice require that notice be postponed. The purpose of the notice is to afford the judge an opportunity to apprise the commission, in writing within 28 days, of such matters as the judge may choose, including information about the factual aspects of the allegations and other relevant comments. The notice shall specify the allegations and may include the date of the conduct, the location where the conduct occurred, and the name of the case or identification of the court proceeding relating to the conduct.
- (2) If the judge is not notified under subrule (C) (1), the commission must provide such written notice bBefore filing a complaint or taking action under subrule (B) (2)-(5). recommending an order of private censure, the commission must give written notice to the judge of the nature of the charges being made and afford The notice

shall provide the judge an opportunity to present in writing, within 28 days, any matters the judge chooses for consideration by the commission.

(3) The commission shall hold a hearing if the judge so requests in response to notice of the commission's decision to proceed under subrules (B) (2)-(5).

(4) On final disposition of a request for investigation without the filing of a complaint, the commission shall give written notice of the disposition to the judge who was the subject of the request. The commission also shall provide notice to the complainant that the matter has been resolved without the filing of a complaint.

~~(D) Resolution of Investigation. If the preliminary examination does not disclose sufficient cause to warrant filing a complaint, the commission may:~~

~~(1) dismiss the investigation;~~

~~(2) admonish the respondent; or~~

~~(3) recommend to the Supreme Court private censure, with a statement of reasons in support of its recommendation.~~

~~The commission must promptly notify the judge of its decision to use one of these alternatives.~~

~~(E) Admonition; Order of Private Censure. An admonition or order of private censure is confidential. If the judge requests a hearing on the recommendation of private censure, the Supreme Court shall remand the case to the commission for a hearing.~~

~~(F) Notice of Disposition of Grievance. On final disposition of a grievance, the commission shall give written notice of the disposition to the complainant and may advise the judge charged with misconduct or disability.~~

~~(G) Physical or Mental Examination. In the course of an investigation of judicial misconduct or of mental or physical disability of a judge, the commission may request the judge to submit to a physical or mental examination. Failure of the judge to submit to the examination is may constitute judicial misconduct. MCR 2.311(B) is applicable to the examination.~~

Rule ~~9-213~~ 9.208 Evidence

(A) Taking of Evidence During Preliminary ~~Inquiry~~ Investigation. Before filing a complaint, the commission may take evidence before it or ~~before~~ an individual member of the commission, or before the executive director or other member of the its staff for purposes of the its preliminary inquiry investigation.

(B) Cooperation With Investigation. A judge, clerk, court employee, member of the bar, or other officer of ~~the a~~ court must comply with a reasonable request made by the commission ~~for aid in its investigation of a judge.~~

(C) Discovery.

(1) Pretrial or discovery proceedings are not permitted, except as follows:

(a) At least 21 days before a scheduled hearing,

(i) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, and a copy of all statements and affidavits given by those persons; and

(ii) the commission shall provide all exculpatory material to the respondent.

~~(1) Within 14 days after the answer to the complaint is filed, the commission shall, on the respondent's written demand, make available for inspection or copying by the respondent documentary evidence in the commission's possession that is to be introduced as evidence at the hearing;~~

~~(2) Within the same time, the commission shall give the respondent written notification of the name and address of any person to be called as a witness.~~

(b) The ~~commission parties~~ shall give supplemental notice to ~~the respondent~~ one another within 5 days after any additional witness has been identified and at least 10 days before a scheduled hearing~~7.~~

(32) A deposition may be taken of a witness who is living outside the state or who is physically unable to attend ~~the a~~ hearing~~7.~~

(43) The commission or the master may order a prehearing conference ~~held before the master~~ to obtain admissions or otherwise narrow the issues presented by the pleadings.

If ~~a the commission party~~ fails to comply with subrules (C) (1) or (2), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B) (2) (a)-(c).

Rule 9.208—Complaint 9.209 Pleadings

The complaint and answer are the only pleadings allowed.

(A) Complaint.

~~(1A)~~ Filing; Service. ~~If, after the preliminary investigation has been completed, the commission concludes that a complaint will be filed, the case must be entered in a docket to be kept for that purpose. The complaint must be filed in the commission's office, to become a public record, and a copy must promptly be served on the respondent. A complaint may not be filed before the completion of a preliminary investigation. Upon concluding that there is sufficient evidence to warrant the filing of a complaint, the commission shall direct the executive director or equivalent staff members to do the following:~~

- ~~(a)~~ enter the complaint in the commission docket, which is a public record;
- ~~(b)~~ retain the complaint in the commission office; and
- ~~(c)~~ promptly serve a copy of the complaint on the respondent.

~~(B2)~~ Form of Complaint. A complaint must be entitled:

"Complaint Against _____, Judge. No. _____."

A complaint must be in form similar to a complaint filed in a civil action in the circuit court.

~~Rule 9.209~~ (B) Answer.

~~(A)~~ (1) Filing. Within 14 days after service of the complaint, the respondent must file with the commission the original and 9 copies of an answer verified by the respondent.

~~(2)~~ Form. The answer must be in form similar to an answer in a civil action in the circuit court, and must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent's ~~alleged misconduct or physical or mental disability.~~ Wilful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint.

~~(3)~~ Affirmative defenses, including the defense of laches, must be asserted in the answer or they will not be considered.

~~(B) No Other Pleadings Allowed.~~ The complaint and answer are the only pleadings.

Rule 9.210 Setting for Notice of Public Hearing; and Appointment of Master and Examiners

- (A) Notice of Public Hearing. ~~Upon~~ ~~On~~ the filing of a complaint, the commission must set a time and a place of hearing before ~~it the commission~~ and ~~give notice of the hearing to notify~~ the respondent at least 21 days ~~in advance before the date set~~, or ~~direct request in writing that the Supreme Court appoint a master to hold the hearing. Such a request must be accompanied by a copy of the complaint. that the hearing be held before a master to be appointed by the Supreme Court.~~
- (B) Appointment of Master.
- (1) If the commission ~~requests that the Supreme Court appoint a master to conduct the hearing, the directs that the hearing be held before a master to be appointed by the Supreme Court, the commission must file an ex parte written request to the Supreme Court to appoint a master for that purpose, accompanied by a copy of the complaint. The Supreme Court shall do so must, within a reasonable period~~ 14 days after receipt of the request, appoint a master to conduct the hearing. The Court shall maintain a list of qualified judges and former judges for this purpose.
- (2) The master shall set a time and place for the hearing and ~~shall notify give notice of the hearing to~~ the respondent and ~~to~~ the examiner at least 21~~8~~ days ~~in advance before the date set~~. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing, ~~except that rulings on dispositive motions shall not be announced until the conclusion of the hearing subject to review by the commission after the filing of the master's report.~~
- (C) Appointment of Examiners. The executive director shall act as the examiner in ~~every~~ a case in which a formal complaint is filed, ~~except unless that the commission may appoints another attorney additional associate examiners in individual cases to act as examiner.~~

Rule 9.211 Public Hearing

- (A) Procedure. ~~At the time and place set for hearing, the commission or the master shall proceed with a~~ The public hearing, which must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court. The hearing must be held whether or not the respondent has filed an answer or appears at the hearing. The examiner shall present the evidence in support of the charges set forth in the complaint, and at all times shall have the burden of proving the allegations by a preponderance of the evidence. A respondent is entitled to be represented

by an attorney. Any employee, officer or agent of the ~~judge's~~ respondent's court, law enforcement officer, public officer or employee, or attorney who testifies as a witness in the hearing, whether called by the examiner or by the judge, is subject to cross-examination by either party as an opposite party under MCL 600.2161; ~~MSA 27A.2161~~.

- (B) Failure to Appear. The respondent's failure to answer or to appear at the hearing may not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for commission action. The respondent's failure to answer, to testify in his or her own behalf, or to submit to a medical examination requested by the commission or the master, may be considered as an evidentiary fact, unless it appears that the failure was due to circumstances unrelated to the facts in issue at the hearing.
- (C) Record. The proceedings at the hearing must be recorded by stenographic or mechanical means ~~a voice recorder or by a stenographer designated by the commission or master~~.
- (D) Rulings. When the hearing is before the commission, at least 5 members must be present while the hearing is in active progress. Procedural and other interlocutory rulings must be made by the chairperson, and are taken as consented to by the other members of the commission unless a member calls for a vote, ~~and then~~ in which event a ruling must be made by a majority vote of those present.

Rule 9.212 ~~Issuance, Service, and Return of Subpoenas~~

~~At the request of the commission, the master, the examiner, the respondent, or the respondent's attorney, subpoenas for the attendance of witnesses and the production of documents before the commission or master may be issued out of the circuit court in the county in which the hearing is to be held, in like manner and with like effect as in civil proceedings. Before the filing of a complaint, the entitlement of the case may not disclose the name of the judge under investigation.~~

(A) Issuance of Subpoenas

- (1) Before the filing of a complaint, the commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the preliminary investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a judge under investigation.
- (2) After the filing of a complaint, the commission may issue subpoenas either to secure evidence for testing before the hearing or for the attendance of witnesses and the

production of documents or other tangible evidence at the hearing.

(B) Sanctions for Contempt; Disobedience by Respondent.

(1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, where the individual is found, where the contempt occurred, or where the hearing is to be held.

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B) (2) (a)-(e).

Rule 9.2143 Amendments to Complaint or Answer

The master, before the conclusion of the hearing, or the commission, before its determination, may allow or require amendments to the complaint or answer. The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present ~~his or her~~ a defense against the matters charged in the amendment.

Rule 9.2154 Report of Master

Within ~~281~~ 28 days after ~~the a transcript of the proceedings is provided, conclusion of the hearing before a master,~~ the master shall prepare and transmit to the commission in duplicate a report ~~which must that~~ contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and answer. The report must be accompanied by two copies of the transcript of the proceedings before the master. On receiving the report and transcript, the commission must promptly send a copy of each to the respondent.

Rule 9.2165 Objections to Report of Master

Within ~~14~~ 28 days after a copy of the master's report and transcript is mailed to the respondent, the examiner or the respondent may file with the commission an original and 9 copies of a statement of objections to the report of the master, along with a supporting brief. A copy of a statement and brief must be served on the opposite party, who shall have 14 days to respond.

Rule 9.2176 Appearance Before Commission

When the master files the report, the commission shall ~~must~~ set a date for hearing objections to the report. The respondent and the examiner must file written briefs at least 7 days before the hearing date. The briefs must include a discussion of possible sanctions. Both may present oral argument at the hearing.

Rule 9.2187 Extension of Time

The commission or its chairperson may extend for periods not to exceed 28 days the time for filing an answer, for the commencement of a hearing before the commission, for the filing of the master's report, and for filing a statement of objections to the report of a master. A master may similarly extend the time for the commencement of a hearing ~~before him or her.~~

Rule 9.2198 Hearing Additional Evidence

The commission may order a hearing, before itself or the master, for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

Rule 9.22019 Interim Suspension

(A) Petition.

(1) After a complaint is filed, the commission may petition the Supreme Court for an order suspending a judge from acting as a judge until final adjudication of the a complaint.

(2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a judge from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and the Supreme Court.

(B) Contents; Affidavit or Transcript. The petition must ~~allege facts supported~~ be accompanied by a sworn affidavit or court transcript, and state facts in support of the allegations and the assertion indicating that the judge is guilty of misconduct in office as defined in MCR 9.205(C) or (E) or suffers from physical or mental disability as defined in MCR

~~9.205(D)~~ and that immediate suspension is necessary for the proper administration of justice.

- (C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent who may file an answer to the petition within 14 days after service of the petition. The commission must be served with a copy of the answer.

Rule 9.2210 Commission Decision

- (A) Majority Decision.

- (1) The affirmative vote of 5 commission members who have considered the report of the master and any objections, and who were present at an oral hearing provided for in MCR 9.2167, or, have read the transcript of that hearing if the hearing was before the commission without a master, the affirmative vote of 5 commission members who were present when the evidence was taken, is required for a recommendation of discipline, removal, retirement, or suspension of action with regard to a judge.
- (2) If the hearing was held without a master, the affirmative vote of 5 commission members who were present when the evidence was taken is required for such a recommendation. Absent 5 votes, the commission must enter an order of dismissal of the complaint. A commissioner may file a written dissent.
- (3) It is not necessary that a majority agree on the specific conduct that warrants a recommendation of action with regard to a judge, or on the specific action that is warranted, only that there was some conduct that warrants such a recommendation.

- (B) Record of Decision.

- (1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference.
- (2) The commission shall undertake to ensure that the action it is recommending in individual cases is reasonably proportionate to the conduct of the respondent, and reasonably equivalent to the action that has been taken previously in equivalent cases.

- (C) Discipline Action With Respondent's Consent. With the ~~respondent's~~ consent of the respondent and the commission, the Supreme Court may impose a sanction or take other action ~~enter~~

~~an order of discipline, suspension, retirement, or removal at any stage of the proceedings under these rules.~~

Rule 9.2221 Confidentiality; Disclosure and ~~Privilege of Proceedings~~

- (A) Before Complaint. Before a complaint is filed, a member of the commission or its staff may not disclose the existence or contents of the investigation, testimony taken, or papers filed in it, but the commission may at any time make public statements as to matters pending before it, only on its determination by a majority vote that it is in the public interest to do so, limited to the fact that:
- (1) there is an investigation pending, or
 - (2) the investigation is complete and ~~that~~ there is insufficient evidence for the commission to file a complaint.
- (B) After Filing of Complaint. After the complaint is filed, the proceedings are available for public inspection and must be conducted in open public hearings.
- (C) Consent of Judge. On the written consent of ~~the~~ a judge ~~against whom a grievance has been filed or~~ who is being investigated, the commission may disclose matters relating to it the investigation, notwithstanding the prohibitions against disclosure set forth in this rule.
- (D) Disclosure to State Court Administrator.
- (1) The commission may refer to the state court administrator grievances requests for investigation and other communications received by the commission concerning the conduct of a judge if, which in the opinion of the commission, the communications are properly within the scope of the duties of the ~~court~~ administrator⁷. The commission and may provide the ~~court~~ administrator with files, records, investigations, and reports of the commission relating to the matter. Such a referral ~~to the court administrator~~ does not preclude action by the commission ~~where~~ if the judge's conduct is of such a nature as to constitute grounds for action by the commission, or ~~which~~ cannot be adequately resolved or corrected by action of the ~~court~~ administrator.
 - (2) The commission may disclose to the ~~state court~~ administrator, upon his or her request, the substance of files and records of the commission concerning a former judge who has been or may be assigned judicial duties by the ~~state court~~ administrator; a copy of the information disclosed must be furnished to the judge.

- (E) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning allegations regarding a judge misconduct to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, the Attorney Grievance Commission may petition the Supreme Court for an order of disclosure, and the Judicial Tenure Commission may file a response.

Rule 9.222 **Record Retention**

The commission shall develop a record-retention policy, which shall include a description of the materials that are to be stored, a list of the time for which specific materials must be maintained, and procedures for the disposal of records.

Rule 9.223 **Certification to Supreme Court**

- (A) Filing and Service of Documents by Commission. Within 21 days after entering an order recommending ~~the discipline, removal, retirement, or suspension of~~ action with regard to a respondent, the commission must
- (1) file in the Supreme Court:
 - (a) the original record arranged in chronological order and indexed and certified;
 - (b) 24 copies of the order;
 - (c) 24 copies of an appendix; and
 - (d) a proof of service on the respondent;
 - (2) serve the respondent with:
 - (a) notice of the filing under MCR 9.223(A) (1);
 - (b) 2 copies of the order and appendix;
 - (c) 2 copies of the index to the original record; and
 - (d) a copy of a portion of the original record not submitted by or previously furnished to the respondent.
- (B) Contents of Appendix. The appendix must include, in chronological order:7
- (1) an index;

- (2) all pleadings, including those filed with a master;
- (3) all orders, including those issued by a master;
- (4) all reports, findings of fact, and conclusions of law made by the commission or a master; and
- (5) other material necessary to fairly judge the issues.

The appendix need not be printed.

Rule 9.224 Review by Supreme Court

- (A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court 24 copies of
- (1) a petition to reject or modify the commission's recommendation~~7, which the petition~~ must:
 - (a) be based on the record,
 - (b) specify the grounds relied on,
 - (c) be verified, and
 - (d) include a brief in support; and
 - (2) an appendix presenting portions of the record not included in the commission's appendix ~~which~~ that the respondent believes necessary to fairly judge the issues. The appendix need not be printed.

The respondent must serve the commission with 3 copies of the petition and 2 copies of the appendix and file proof of that service.

- (B) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file
- (1) 24 copies of a brief supporting its finding, and
 - (2) proof that the respondent was served with 2 copies of the brief.
- (C) Review in Absence of Petition by Respondent. If the respondent does not file a petition, the Supreme Court ~~shall~~ will review the commission's recommendation on the record filed. The Supreme Court may order that briefs be filed or arguments be presented.
- (D) Form of Briefs. A brief filed under this subrule is to be similar to a brief in an appeal to the Supreme Court, except that a brief may be typewritten.

- (E) Additional Evidence. The Supreme Court may, if cause is shown, order that further evidence be taken and added to the original record.
- (F) Submission. The clerk will place the case on a session calendar under MCR 7.312. Oral argument may be requested.

Rule 9.225 Decision by Supreme Court

The Supreme Court shall review the record of the proceedings and ~~shall~~ file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction ~~direct censure, removal, retirement, suspension, or other disciplinary action, or reject or modify the recommendations of the commission.~~ When appropriate, the Court may remand the matter to the commission for further proceedings, findings, or explication. If the respondent and the commission have consented to a course of action under subrule 9.220(C) and the Court determines to impose a greater, lesser, or entirely different sanction, the respondent shall be afforded the opportunity to withdraw the consent and the matter shall be remanded to the commission for further proceedings.

Rule 9.226 Motion for Rehearing

Unless the Supreme Court directs otherwise, the ~~The~~ respondent may file a motion for rehearing within 14 days after the filing of the decision. ~~However, If~~ the Supreme Court directs in the decision that a motion for rehearing may not be filed, the decision is final on filing.

Rule 9.227 Immunity

A person is absolutely immune from suit for statements and communications transmitted solely to the ~~Judicial Tenure Commission or the commission staff~~ its employees, or given in an investigation or proceeding on ~~alleged misconduct~~ allegations regarding a judge, and no civil action predicated upon the statements or communications may be instituted against a complainant, a witness, or their counsel. Members of the ~~Judicial Tenure Commission and their counsel and staff~~ employees, masters, and examiners are absolutely immune from suit for all conduct in the course of their official duties.

Rule 9.228 Ethics Materials and Programs

The commission shall work with other groups and organizations, including the State Bar of Michigan, to develop educational materials and programs that are designed to help judges maintain an awareness and understanding of their ethical obligations.

Staff Comment: The proposed amendment of subchapter 9.200 of the Michigan Court Rules is a response to recommendations from numerous individuals, associations, and the Judicial Tenure Commission concerning Michigan's judicial discipline system. The proposal encapsulates in formal rules several unwritten practices of the commission that separate the investigative and prosecutorial functions of its staff from the commission's decision-making function. Other proposed rules strengthen due process rights by providing respondent judges with earlier and fuller notice, and sharpen the commission's investigative tools.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court clerk in writing or electronically by May 1, 2002. P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@jud.state.mi.us. When filing a comment, please refer to file **99-31**.